OWNERS OF CARGO LATELY LADEN ON BOARD THE SHIPS OR VESSELS "STOLT LOYALTY" AND "MAYA"

v.

OWNERS OF & OTHER PERSONS INTERESTED IN THE SHIPS OR VESSELS "STOLT LOYALTY" & "MAYA"

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[ADMIRALTY IN REM NO. 3 OF 1983]
17 OCTOBER 1984

INTERNATIONAL LAW: *Trade - Goods damaged in transit - Plaintiffs suffered loss.*

CIVIL PROCEDURE: *Defendants applied for stay of proceedings pursuant to s. 6 of Arbitration Act - Contract of Affreightment provided all disputes to be settled in New York - Whether Malaysian Courts have discretion whether or not to grant stay.*

The plaintiffs were owners of cargo on the defendant's vessel "Stolt Loyalty" and were holders or indorsees of a Bill of Lading No: PG/38-2.

Upon delivery the cargo was found by the plaintiffs not to be in good order or condition but was damaged with water and as a consequence the plaintiffs suffered loss which was valued at RM27,035.77.

After the plaintiffs had filed the writ and the defendants had entered an unconditional appearance, the defendants applied by way of a Summons-in-Chambers for a stay of all future proceedings pursuant to s. 6 of the Arbitration Act 1952. The defendants alleged that the plaintiffs were bound by a contract of affreightment dated 20 May 1980 which provided that all disputes are to be settled in New York by arbitration.

Held:

[1] The evidence on the issues of fact insofar as it relates to the condition of the cargo is more readily available in Johore, and the expense of a trial in Johore would be less than arbitration in New York.

[2] Malaysian Law is applicable to the contract, by virtue of Hague Rules Article 3 contained in the Bill of Lading and which rules have been imported into Malaysian Law.

[3] The United States has no connection with the contract except that the arbitration be held there.

[4] By requesting a stay of execution the defendants seem to be seeking a procedural advantage.

[5] The plaintiffs would severely prejudiced in having to sue in New York because they would (a) be deprived of security for their claim (b) be faced with a possible time bar, (c) the economics of the situation would make it wholly punitive for them to go to New York.

[6] Malaysian Courts have discretion whether or not to grant stay.

[Defendants' application refused.]

Cases referred to:

Amerco Timber Pte. Ltd. v. Chatsworth Timber Corporation Pte. Ltd. [1977] 2 MLJ 181
Ford v. Clarksons Holidays Ltd. [1971] 3 All ER 454

For the plaintiffs: Matthew Varughese; *M/s Varughese Co.*
For the defendants: Francis Puthucheary; *M/s Kuok & Puthucheary*

JUDGMENT

Mahadev Shankar J:

On 25 April 1982 a Bill of Lading No: PG/38-2 was issued at Johore Port by or on behalf of the defendants whereby 489.390 long tons of palm fatty acid distillate in bulk was shipped on board the defendants' vessel "Stolt Loyalty" at Pasir Gudang, Johore. The aforesaid cargo was then in good order and condition for carriage by sea for reward to and delivery at Greenhithe, London in like good order and condition.

The plaintiffs were the owners of the aforesaid cargo and/or were the holders or indorsees of the said Bill of Lading. Further or alternatively the plaintiffs presented the said Bill of Lading to the defendants at Greenhithe, London and the defendants thereupon delivered up the aforesaid cargo to the plaintiffs.

But upon delivery, the aforesaid cargo was not in like good order or condition but was damaged with water as a consequence of which the plaintiffs suffered loss which has been valued at RM27,035.77. This action is for the recovery of that loss and consequential relief by reason of the alleged breach of the contract and/or breach of duty and/or negligence of the defendants, their servants or agents.

The plaintiffs filed this writ on 26 April 1983. On 19 October 1983 an unconditional memorandum of appearance was entered for Thoresen & Co. (S) Pte. Ltd.

On 7 November 1983 an unconditional Memorandum of Appearance was entered for the owners of the ship "Stolt Loyalty" in this action.

On 10 November 1983 the owners of the ship "Stolt Loyalty" applied by way of a Summons-in-Chambers for all further proceedings in this action to be stayed pursuant to s. 6 of the Arbitration Act, 1952.

The grounds of this application are as follows.

It is alleged for the ship owners that the plaintiffs are bound by an agreement in writing dated 20 May 1980. That agreement is a Contract of Affreightment made between Anthony Redcliff Steamship Company Limited UK as Time-Chartered Owners and Pan Century Edible Oils Sendirian Berhad as Charterers. This contract of affreightment included a Tanker Voyage Charter Party which by Clause 4 thereof provided for disputes to be settled in New York by arbitration. The arbitration clause reads as follows:

> 4. Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an Arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third Arbitrator who shall be an admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a Judgment of the Court shall be entered upon any award made by the said Arbitrator. Nothing in this Clause shall be deemed to waive owner's right to lien on the cargo for freight, dead freight, or demurrage.

The Bill of Lading hereinbefore referred to provided that:

> "This shipment is carried under and pursuant to the terms of the Charter dated 20 May 1980 between Anthony Redcliff Steamship Company Limited and Pan Century Edible Oils Sdn. Bhd. Johore Bahru as Charterers and the terms whatsoever of the said Charter except the rate and payment of freight specified therein and applied to govern the rights of the parties concerned in this shipment. Copy of the Charter may be obtained from the shipper or charterer."

It is the contention of the defendants that these 2 clauses imposed upon the plaintiffs an obligation to have their dispute referred to New York for arbitration.

They rely wholly upon the aforesaid Arbitration clause for the relief which they seek.

The plaintiffs on the other hand have vigorously resisted the application for stay and they have averred in para. 11 of their Affidavit that the disputes which arise out of the Bill of Lading are not subject to the Arbitration clause.

I do not find it necessary in all the circumstances to decide this point.

In para. 12 of the Plaintiffs' Affidavit, the grounds why the Court should refuse stay is spelt out as follows:

i. This Honourable Court has jurisdiction to hear and determine this claim.

ii. There is a strong cause for refusing a stay.

iii. The shipment of cargo was from Pasir Gudang Johore for delivery at Greenhithe, London. All the evidence on the issues of fact in this case are situated in Johore Bahru and/or are more readily available in Johore Bahru. No evidence exists in New York.

iv. The plaintiffs in this action are a Malaysian corporation and are very closely connected with this country.

v. The defendants do not genuinely desire arbitration in New York but are merely seeking procedural advantages over the plaintiffs and it is clear that the plaintiffs would be prejudiced by having to arbitrate in New York for the following reasons:

   a) The claim amount herein is for the sum of RM27,035.77.

   b) The plaintiffs have ascertained that on a rough estimate, the cost of arbitration would be about the claim amount itself.

vi. The plaintiffs are therefore unlikely to recover their loss even if they should succeed at an arbitration in New York.

In the course of the arguments, it transpired that the cargo was carried to Rotterdam in "Stolt Loyalty". There it was trans-shipped to the "Maya". This latter vessel delivered the cargo to Greenhithe in allegedly damaged condition.

In the course of the dispute which subsequently surfaced, the plaintiffs were given security by way of a letter from a P & I Club in Hong Kong and I have been informed that this security is only good for the present action. It will lapse if the action is stayed and is of no value as regards any arbitration in New York.

It also transpired that the surveyor's reports relating to the damages originate in England.

As to the other aspects of the matter, it would appear that all the plaintiffs, witnesses relating to the condition of the cargo are in Johore. The affidavit filed on behalf of the defendants by one Ms. Daisy Chua is to the effect that she is the Operations Assistant of Stolt-Nielsen

Singapore Pte. Ltd., that she has personal knowledge of relevant matters relating to this dispute acquired during the course of her duties as Operations Assistant of Stolt-Nielsen Singapore Pte. Ltd., and that she works and resides in Singapore.

Both Counsel cited a number of authorities to me.

With respect, it is my view that the criteria set out by Kulasekaram J in *Amerco Timbers Pte. Ltd. v. Chatsworth Timber Corporation Pte. Ltd.* [1977] 2 MLJ 181 apply equally to the present case.

There an application was made to stay the action because the parties had agreed to submit their differences to a Court in a foreign jurisdiction i.e. Jakarta. Here, we are concerned with an arbitration.

At p. 182 of that judgment, 5 criteria were set out and applying them to the facts before me I have reached the following conclusions:

a. The evidence on the issues of fact insofar as it relates to the condition of the cargo when it was shipped is more readily available in Johore. Whilst the evidence relating to the issue of the damage may be contained in the surveyor's report which originate from the United Kingdom, the effect of that on the relative convenience and expense of a trial as between Johore Bahru and an arbitration in New York must of necessity favour Johore Bahru, the more so as the defendants' Operations Assistant is in Singapore and the English evidence can be made available by letters of request or on commission.

b. It has not been suggested to me that any foreign law is applicable in this matter by virtue of some special agreement between the parties and therefore Malaysian law would apply. Furthermore, the Hague Rules Article 3 contained in the Bill of Lading and such rules have been imported into Malaysian Law.

c. On any view of the matter, the United States of America is not connected with the contract except that the arbitration is to be held there.

d. In all the circumstances, I am not convinced that the defendants genuinely desire this trial to take place by way of an arbitration in New York. No grounds for such desire have been articulated in Ms. Daisy Chua's Affidavit and the blanket reliance on the arbitration clause for a stay of proceedings without reference to any other grounds why such a stay should be ordered, have left me with the feeling that the defendants are seeking a procedural advantage only.

e. The Plaintiffs in this case would be severely prejudiced in having to sue in New York because they would:

i) be deprived of security for their claim;

ii) be faced with a possible time bar;

iii) The economics of the situation are such that it would make it wholly punitive for them to go to New York. There are telexes in evidence to the effect that American Arbitration are very expensive and that the economics of the exercise will not make the claim worth while.

In *Ford v. Clarksons Holidays Ltd*. [1971] 3 All ER 454 at p. 455 Davies LJ said that:

> It is open to question whether, if all other relevant conditions are satisfied for the granting of a stay, the court has discretion whether or not to grant a stay. The provisions in s. 4 of the Arbitration Act 1950 that 'the court ... may make an order staying the proceedings' may give the Court a discretion or it may be merely an empowering provision (see p. 457 c, post).

It is my view, with respect, that where there are reasonable grounds for thinking that an arbitration clause is being used to stifle an otherwise legitimate claim, the Courts should properly refuse to stay proceedings particularly if the arbitration envisaged is to be held in some remote part of the world which has little or nothing to do with the place where the contract is to be performed or the place where the witnesses are located.

Notwithstanding the reservations of Davies LJ aforesaid I hold that the Malaysian Courts have a discretion whether or not to grant a stay, and it is in the exercise of this discretion that I refused the defendants' application. In all the circumstances of the case, I hold that the Courts have an inherent jurisdiction to prevent an injustice or an abuse of its process. Given all the circumstances of this case I would have been prepared, if the need had arisen to refuse this stay in the exercise of the inherent powers of this Court. Whether or not public policy should be invoked in cases of this kind can be left for consideration on some future occasion.

The defendants will pay the plaintiffs the costs of this application as taxed by a proper officer in this Court.

Also found at [1985] 1 CLJ 290